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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 507

The INTERSTATE COMMERCE COMMISSION, the WELLETT COMPANY OF INDIANA, INC., and the PENNSYLVANIA RAILROAD COMPANY,

Appellants,

vs.

HARRY A. PARKER, Doing Business as PARKER MOTOR FREIGHT, REGULAR COMMON CARRIERS CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., Et Al.

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR APPELLEE, NORWALK TRUCK LINE COMPANY

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The Norwalk Truck Line Company appeared as a protestant before the Commission (R. 74), and as a plaintiff in the court below. (R. 17.)

Findings and Decree of Court Below

The findings of fact, conclusions of law thereon and decree of the specially constituted District Court from whose judgment this appeal is taken are as set out in the Appendix and embrace the following findings: The proposed motor carrier operations were competitive; present motor carriage was not shown inadequate; the railroad was unwilling to use any existing and available motor lines; and public convenience and necessity did not appear from the evidence.

The decree enjoined operation under the Commission order.

STATUTE INVOLVED

The statute involved is the Interstate Commerce Act, Part II. The applicable provisions thereof are set forth in the Appendix, infra, pp. 37-41.

THE QUESTIONS INVOLVED

Generally, the questions involved are:

1. Whether the applicant met the statutory requirements as a proposed common carrier.

2. Whether the evidence was such as to justify the District Court in finding it insufficient to support the Commission's findings.

3. Whether the findings were such as to justify the District Court in determining that the Commission's conclusions should not be sustained.

4. Whether the record or order disclosed a proper application of statutory standards and policy.

Certain questions inherently broader than the foregoing are likewise involved, *e.g.*

(a) Whether the Commission under the general policy of the Act did not have power to order the co-ordination of one or more forms of transportation service with one or more of the other forms of transportation service without creating new and otherwise unnecessary ones.

(b) Whether the policy of the Act, to preserve the inherent advantages of each mode of transportation to the end of developing, co-ordinating, and preserving a national transportation system by water, highway, and rail, is not violated by the practice of granting to railroads authority to institute competitive motor service where such railroads refuse to co-ordinate their services with available motor carriers operating in the field.

(c) Whether terms such as "auxiliary service," "supplemental service," "railroads' own freight," "useful public service;" or "co-ordinated auxiliary service" may be imported into the Statute to create types of carriage and carriers and standards not recognized by the Statute.

STATEMENT

The judgment and decree of the Court below was rendered upon an action (R. 1-8) instituted by appellee, Harry A. Parker, d/b/a Parker Motor Freight, in the United States District Court to set aside an order (R. 6-14) of the Interstate Commerce Commission, approved September 25, 1943, granting a Certificate of Public Convenience and Necessity to the Willett Company of Indiana, Inc., authorizing operation as a common carrier of property in interstate and foreign commerce over the public highways between Fort Wayne, Indiana, and Mackinaw City, Michigan, serving all station points of the line of the Pennsylvania Railroad extending between said cities of Fort Wayne and Mackinaw City and branch lines in the State of Michigan connecting therewith.

This appellee was one of the motor carriers appearing as protestants in the proceedings before the Interstate Commerce Commission (R. 74), and was an intervening plaintiff in the action in the court below. (R. 17.)

The Pennsylvania Railroad Company was not an applicant but appeared in support of the application of appellant, Willett Company. (R. 74.) The railroad neither filed nor tendered any earnings statement nor any statements relative to its financial condition, and there was no evidence on the subject.

The application (R. 59) did not pertain in any respect to a consolidation or merger of properties or franchises of carriers into one corporation; nor to the purchase, lease or contract to operate the properties of any carrier by another single carrier or by carriers jointly; nor to the acquiring of control of any carrier through ownership of its stock or otherwise.

The service proposed to be rendered by the applicant was the transportation by motor vehicle of commodities generally moving on freight bills or bills of lading of the Pennsylvania Railroad (R. 163, 171); under the railroad's published tariffs (R. 171), and consigned to receivers of freight at station points along the lines of the Pennsylvania Railroad from Fort Wayne, Indiana, to Mackinaw City, Michigan. (R. 92-94.)

The mileage included in the routes over which the proposed service was to be rendered aggregated 569.9 miles by highway serving points along 454.7 miles of the railroad. (R. 432.)

The estimated monthly tonnage to be handled by the applicant over all of the proposed routes in the proposed service was 3,400,020 pounds. (R. 95-98, 427.)

All solicitation of freight and all billing and receipting were to be performed exclusively by the railroad. (R. 106.) All freight was to move on railroad tariffs and all revenue from freight carried was to accrue to the railroad.

The applicant is a wholly-owned subsidiary of the Pennsylvania Railroad Company (R. 146), and proposed, in the event the requested authority was granted, to render service exclusively to the Pennsylvania Railroad Company under such contract, in which the applicant was described as being engaged in the trucking business as an original private and independent contractor (R. 723-725), but had no control over time, schedules, rates, no business contracts and no power of contract with shippers; the contract was terminable by either party on thirty days' notice. (R. 725.)

The specially constituted U. S. District Court found the proposed motor carrier operations of the applicant would be competitive with existing motor carrier service; that the railroad refused to make use of any of the existing motor lines; that there was no evidence to show that the service rendered by existing motor carriers was or would be inadequate, and no substantial evidence to prove public convenience and necessity had been offered. (R. 45 and Appendix p. 36.)

The court's conclusions of law and findings were that (a) the applicant did not meet the statutory requirements, (b) the Interstate Commerce Commission failed to exact from the applicant, as a railroad subsidiary, the requisite proof to establish public convenience and necessity, (c) there was no substantial evidence to support the order of the Commission that public convenience and necessity required the issuance of a certificate of public convenience and necessity authorizing the proposed operations over

the routes involved, and (d) the order was, therefore, illegal and void and should be permanently enjoined. (R. 45, 46 and Appendix p. 37.)

SUMMARY OF ARGUMENT

The applicant did not meet the statutory requirements for qualification as a common carrier of freight by motor vehicle.

The status of the applicant did not conform to the definition of the term "common carrier" as provided in Sec. 203 (a) (14) of Part II. (See Appendix p. 37.)

The applicant did not propose to conform with the provisions of the Act requiring the publishing and filing of tariffs and the issuance of bills of lading. (See Appendix, pp. 38, 39.)

The applicant was an operator-owner of motor vehicles operating for the Pennsylvania Railroad Company under contract. Thomson v. United States, 321 U. S. 19, 24, 25; United States v. N. E. Rosenblum Truck Lines, 315 U. S. 54, 55.

No issue relating to merger, consolidation, or acquisition of control between or among carriers of any class was presented by the application or by the evidence.

The standards for testing an application for merger between carriers or acquisition of control of one carrier by another are not applicable to an application for original grant of certificate of public convenience and necessity for a new carrier. (Contrast, Sec. 5 (2) (a) and (b) and Sec. 207 (a) of the Act.)

The structure and policy of the Act contemplate preservation of the identity of the several types of carriers, subject only to such authority for co-ordination between

existing carriers of different types as the need of a national system of co-ordinated carriers may require and to specific exceptions, involving merger and control, provided for in the Act and not applicable here.

It is contrary to the intent, policy and purpose of the Act to permit one carrier by its own refusal to lend its facilities to co-ordination or connecting carriage with other adequate, existing competing carriers, to create a supposed public need and ground for grant of certificate, for new carriage or routes, to it or its nominee.

The right and duty of the Commission to require essential co-ordination of existing carriers, *United States v. Pennsylvania Railroad Company*, 67 S. Ct. 471, 473, and the policy of the Act to permit an integrated system for serving various modes of carriage, is opposed to the theory that co-ordination of rail with motor carriers is a matter of rail carriers' volition or a matter of giving dominance and control to rail carriers.

The theory that a rail carrier has an inherent right to a certificate of carriage by motor of all freight that can be successfully solicited by it for carriage either by rail and motor or by motor alone in serving motor stations on its own lines and on highways paralleling its lines, would operate to exclude independent motor carriers. Such theory is in conflict with the policy and purpose of the Act, and the repeated indulgence of the theory by the Commission cannot operate to change the force and effect of the Act.

The evidence offered to support a conclusion that the proposed new carrier grant was a matter of public convenience and necessity does not disclose any convenience or necessity of the public that would not be equally well served by acceptance by the rail carrier of tendered co-

ordination by numerous existing motor carriers, or by Commission order for co-ordination between rail and existing motor carriers.

> The railroad company would lose profit of motor carriage by denial of the application, but such loss does not appear to be of sufficient consequence to impair the national system of transportation, or to justify a conclusion that the existing carriers could not serve the public as well as the applicant.
>
> The theory that involuntary co-ordination would work compulsory duty on the existing competing carriers and might in some respects be less pleasing to the rail carrier than would be a new grant, is not a theory by which to overcome the broad purpose of the Act to serve public convenience and necessity without waste or duplication of existing carrier service and facilities.

The existing motor service was admittedly adequate and highly competitive, the motor carriers were willing, able and wanting to carry all freight which the Railroad proposed to solicit for the applicant. In such a state of competition and without restrictions limiting the applicant to freight of rail origin or termination, it could not be said that the competition of the applicant, whether called direct or indirect, would not be prejudicial, and this is no less true if, as is apparently assumed by the order, the quantity of freight to be solicited by the Railroad and carried by the applicant was of substantial consequence to the public.

> The claim that the competition of the applicant would not be prejudicial to the existing motor carriage, but would be so acute as to render it undesirable for the Railroad to risk co-ordination with an

existing carrier, lacks the consistency necessary to support a finding of absence of competition.

The mere adoption by an administrative body of new nomenclature or terminology such as "auxiliary," "substituted or supplemental service," "public utility," "new type of carriage," "railroad's own freight," "indirect competition" for old facts and circumstances known at the time of the enactment by Congress, do not expand or diminish or render inapplicable the purpose, force or effect of the enactment.

The restrictions of the order do not prevent continuous carriage, entirely by motor and without rail origin or termination, for at least 500 miles in one general direction and to and through the industrial centers and towns built along the rail line or through which the rail line was built; do not prevent such carriage of full *truckloads* (which, rather than *carloads*, is the material unit in permissive motor carriage) for such distance and through such points, and do not prevent such solicitation and carriage by motor of all freight that can be obtained along the route through the active, intended solicitation of the Railroad. Such restrictions consequently are not a substantial limitation of competition between the applicant and existing motor carriers, and findings based on the theory that it is such a limitation are unwarranted findings.

No claim of intent of the Railroad for self-restraint in the carriage of freight by motor may be considered, the intention being subject to change uncontrolled by any restriction in the order, and the Railroad not being subject to the order.

The fact that the Commission reserved authority to modify the order does not affect the force or the present effect of it or any question arising on the face of it as

it now stands. Federal Power Commission v. Hope Natural Gas Company, 64 S. Ct. 281, 295; I. C. C. v. Inland Waterways Corporation, 319 U. S. 671, 701.

The decision of the District Court is correct, if applicant is not a common carrier, or the evidence does not support the Commission's findings, or the findings its conclusions; or if the material facts failed of consideration, or the bases of its conclusions do not clearly appear from the findings; or if the statutory standard and policy were not correctly interpreted and applied.

ARGUMENT

I

THE APPLICANT WAS NOT A PROPOSED COMMON CARRIER WITHIN THE DEFINITION OF THE ACT

The application, on its face, was for proposed common carrier operation in transport of commodities generally by motor vehicle in interstate commerce. (R. p. 60.) The Commission's order thereon was for grant of certificate of public convenience and necessity to the applicant as a common carrier by motor vehicle. The grant is governed by Part II of the Interstate Commerce Act. Section 203 (a) (14) of the Act defines the term "common carrier" as meaning "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers of property or any class or classes thereof for compensation."

The record discloses, and the briefs of the appellants admit and claim that the Pennsylvania Railroad exclusively was to solicit all freight transported by the applicant, to contact and contract with the public in respect thereto; was to determine the schedules or times of operation of the applicant, the amount of freight to be carried, the stations between which it should be carried, and to assume complete responsibility and control of the motor carrier operations, except for the furnishing of motor equipment and employment of drivers. The motor carrier was to have "*no relationship whatsoever with the general public.*" (R. pp. 65, 75. Commission's Brief p. 43. Pennsylvania Railroad Brief p. 8.) In this connection it

is to be noted that the Act (Sec. 217 (a) Part II) imposes upon every common carrier the duty of filing with the Commission and keeping open for public inspection tariffs showing all rates, fares and charges for transportation and all services in connection therewith; and Section 219 of Part II of the Act requires all common carriers by motor vehicle to comply with Section 20 (11), (12) of Part I of the Act requiring the issuance of receipts or bills of lading by the common carrier when receiving property for transportation. (Appendix pp. 38, 39.)

The contract between the applicant and the Railroad relating to the proposed carriage is entirely amenable to the construction placed upon it by the evidence of the intention of the parties thereto and the manner in which they would actually operate. That contract (R. p. 723) refers to the applicant as a trucker engaged in the trucking business as an original *private* and *independent* contractor. The term "independent contractor" may be mere nomenclature within the decision of this court in Thomson v. United States, 321 U. S. 19, 22, 24, 25 and United States, et al. v. N. E. Rosenblum Truck Lines, Inc., 315 U. S. 50, 54, 55.

Further provisions of the contract required the applicant "to indemnify railroad"; to comply with Railroad's rules and regulations. Payment of the applicant for its services was to be made by the Railroad on the basis of motor units involved and mileage traveled, and the employment of additional equipment by the applicant was subject to the direction and authorization of the Railroad. The contract was subject to termination by either party upon thirty days' written notice. (R. 725.)

The record and the findings, including the contract between Railroad and applicant and the claim of applicant

as to the nature of its proposed service, all disclose that the requirements of the statute for common carrier, viz.: "a person which holds itself up to the general public to engage in transportation by motor vehicle of property for compensation" were not met by the person of the applicant, and further disclose that the Railroad, which is not the applicant, is the only common carrier involved in the proposed carriage.

The following language from Thomson v. United States, 321 U. S. 19, is applicable:

> "The written contracts describe the operators as 'independent contractors' and state that 'nothing herein contained shall be construed as inconsistent with the status.' The contractors are bound by these contracts to provide vehicles of a type satisfactory to the railroad for the purpose of transporting freight between certain specified freight stations in accordance with such schedules and instructions as shall be given by the railroad. The contractors agree to transport such freight as the railroad designates in a manner satisfactory to the railroad. All persons operating the motor vehicles are under the employment and direction of the contractors and are not considered railroad employees. The operations are conducted under the contractors' own names and the vehicles do not display the railroad's name. The contractors further agree to comply with state, federal and municipal laws and to indemnify the railroad against any failure or default in this respect. They also agree to indemnify the railroad against all loss or damage of any kind resulting from the operation of the motor vehicles. (Id. p. 22.)
>
> "The undisputed facts here disclose that only the railroad holds itself out to the general public to engage in a single complete freight transportation service to and from all points on its lines. As an integral and essential part of this service tendered by the rail-

road, motor vehicle transportation between certain stations is provided. It is completely synchronized with the rail service and had none of the elements of an independent service offered on behalf of the motor vehicle operators. Their operations are the operations offered by the railroad as component parts, not as separate or distinct segments, of its single service. They may be replaced or eliminated at the sole discretion of the railroad." (Id. p. 24.)

While under the order the applicant can engage in transportation of freight which has no origin or termination in rail carriage, nevertheless it is the railroad alone which can contact and contract with the public for transportation under the evidence.

Whatever may have been the reason that application was made by Willett Company rather than by the Railroad, whether because of any bearing on the question of "indirect competition" or otherwise, the material fact remains that, in the main, throughout the Commission's findings and order, the Railroad was considered essentially to be the applicant.

Without a proper applicant for common motor carriage before it, an applicant within the definition and requirement of the Act, the Commission was without authority to grant the order.

In its assumption that the applicant qualifies as a common carrier entitled to a certificate, the Commission adopted a new and novel definition of the term, unwarranted by approved standards of nomenclatorial construction.

While this departure from established standards of construction is, in itself, of sufficiently serious nature to condemn the entire proceedings before the Commission, the matter is particularly significant as indicating the proc-

esses of reasoning which activated the Commission in its decisions on other and vital issues involved.

II

THE APPLICATION IS FOR CERTIFICATE OF PUBLIC CONVENIENCE FOR COMMON CARRIAGE, AND THE SECTIONS OF THE ACT AND STANDARDS RELATING TO MERGER OR ACQUISITION OF CONTROL DO NOT APPLY

The statutory requirement for merger or acquisition of control of existing carriers and the statutory requirement for grant of certificate for common carriage by motor vehicle are separate and distinct requirements. (Section 5 (2) (a) and (b) and Section 207 (a) of the Act.) For merger and acquisition of control the requirement is that they shall be consistent with the *public interest and not unduly restrain competition;* for certificate of public convenience and necessity for common carriage by motor vehicle, the statutory requirement is *public convenience and necessity.*

The application of Willett Company is for certificate of public convenience and necessity, not for merger or acquisition of control, and the standard for testing the merit of the application is *Public convenience and necessity.*

While there is some relation between the statutory standard for merger and that for certificate for common carriage, the two standards are by no means synonymous. It appears from the Act that application for merger and for acquisition of control of another carrier involves only existing carriers previously certified as to public convenience and necessity. As an incident of this requirement

for merger and control, public interest for merger could not be found unless public convenience and necessity for operation had previously been found. But that is a mere incident of the order in which certificates for carriage and grants for merger must occur and is not inherent in the meaning of the terms "public interest" and "public convenience and necessity."

The Commission found that the proposed service would have public use, would inure to the benefit of the general public, but these findings do not meet the statutory requirement for certificates of public convenience and necessity. United States v. Carolina Freight Carriers Corporation, 315 U. S. 475.

The conclusion of the Commission that public convenience and necessity required the grant of certificate in so far as based on the findings that the proposed service would have useful public purpose and would benefit the public, would not be supported by such findings even if the findings themselves had been supported by the evidence.

III

THE CORRECT STATUTORY STANDARD MUST NOT ONLY BE RECOGNIZED BUT CORRECTLY APPLIED TO SUSTAIN AN ORDER GRANTING A CERTIFICATE FOR MOTOR CARRIAGE

There are numerous decisions in which the evidence has been adequate to support the findings and the findings to support the conclusions and in which this Court has said that it was not the province of the Court to exercise administrative judgment under such circumstances. The question here presented, however, is whether there is ade-

quacy of evidence and findings and whether the controlling statutory standard has been properly applied. These are questions which Courts can and do determine. Florida v. United States, 282 U. S. 194, 212, 215; Interstate Commerce Commission v. Northern Pacific Railway, 216 U. S. 538, 544, 545; United States v. Carolina Freight Carriers Corporation, 315 U. S. 475; Eastern-Central Motor Carriers Association v. United States, 64 S. Ct. 499 at 508.

It has been suggested that the statutory standard of public convenience and necessity, is not subject to definition or limitation and that as a consequence the Commission may give its own application to the standard. However, it has never been held by this Court that public convenience and necessity are such nebulous elements as to be without possibility of judicial comprehension or to lack the definitive basis essential to permit review. The contrary has been held, Eastern-Central Motor Carriers Association v. United States, 64 S. Ct. 499; New York Central Securities Company v. United States, 287 U. S. 12; and, it seems, necessarily so if the statutory authority for the commission to issue certificates is given validity.

The findings of the Commission are predicated upon the assumption that, where a railroad controls a motor carrier operating in a competitive field and carrying freight, a part of which has originated on or will terminate on rail, there is no direct competition with the other motor carriers; that "less than carload lots" has some significance in motor carriage in which the unit capacity is truckload lots and necessarily less than carload lots; that a service rendered by a subsidiary applicant of a rail carrier is a better service on behalf of the public than the same carriage if performed by independent motor carriers ready, willing, qualified and certified by the Commission

for carriage; that it is possible to identify or recognize future freight, to be derived from sources and points within a given territory as peculiarly the freight or traffic of the railroad in which the railroad has some inherent cognizable and identifiable right, and that this applies not to the traffic that has been, but the traffic that is to be solicited in competition in the future; that the economy and expedition of motor carriage, both independent of and in association with rail carriage, is greater if performed by motor carrier, controlled by the railroad, than if performed by qualified independent carriers. These assumptions are without warrant in the evidence and are not inherently true apart from evidence showing the special circumstances, if any, under which they might be true. They cannot supply the omission of evidence. So great a part do these assumptions play in the findings of the decision that it is, to say the least, difficult to determine whether they have not constituted the sole reliance of the Commission for its order. If such was not the reliance of the order, the question then arises as to what may have been the basis upon which the Commission reached its conclusion that public convenience and necessity required a grant of certificate, a question considered in the next division of this argument.

IV

A RAIL CARRIER HAS NO INHERENT RIGHT TO CERTIFICATE FOR CARRIAGE OF FREIGHT BY MOTOR WHEN ADEQUATE INDEPENDENT MOTOR CARRIAGE EXISTS AND IS WILLING, ABLE, READY AND WAITING TO RENDER THE SERVICE

The briefs of the Commission and the applicant have correctly pointed out that it has been an almost uniform practice of the Commission to grant to rail carriers or their

subsidiary applicants certificates of public convenience and necessity for motor carriage whenever it appears that the railroad desires to employ motor carriage more or less in connection with its rail service. Such motor carriage has been described by the Commission as "auxiliary" or "supplemental" rail service. The Commission, however, has recognized the difficulty of defining the terms (see Southern Pacific Co., Control Valley Motor Lines, Inc., MC-F-2073, 39 M. C. C. 441), and almost uniformly in the later grants, the railroad has been permitted to engage extensively in the carriage of freight which is to be transported by motor vehicle only.

The definitions do not disclose justification for the practice, nor does terminology adopted by the carriers, such as "new type of carriage", "railroad's own freight", "carriage for the railroad only" (discussed in Division VI herein) work the justification. For, after the terminology is applied, the same facts and conditions remain, and the same policy of the Act and language of the Act applies to them. Nor is there any inherent right of the railroad to economy that may as well be accomplished by motor carriers, as by a railroad subsidiary, and that if achieved by the subsidiary will actually be paid for by the other carriers. War need does not now, and in peace could not, account for the supposed inherent right, for there is no war need that is served by trading freight cars and coal for twice as many trucks, motors, much rubber, gasoline and oil and keeps idle many independent truck units with probability of increase in numbers as the motor carriage competition is accelerated by the arrival of the subsidiary.

The only inherent right of rail carriers to motor carriage certificates is represented by the "grandfather" clause. Otherwise, where public convenience and necessity is not

established by substantial proof the certificate is not justified, and special presumptions may not properly be indulged to supply omission of proof.

V

THE COMMISSION HAS THE POWER TO REQUIRE COORDINATION BETWEEN THE RAIL AND MOTOR CARRIERS, BUT IF IT HAD NOT, NO INFERENCE WOULD ARISE, UNDER THE STATED POLICY OF THE ACT, THAT THE ABSENCE OF SUCH AUTHORITY REFLECTED A STATUTORY INTENT THAT RAIL CARRIERS COULD SUBSTITUTE ABSORPTION FOR COORDINATION

It is possible that the holdings of the Commission, that it has no authority to require coordination between rail and motor carrier, have led to the reasoning by which rail carriers desiring to enter the motor carrier field have been held to be entitled to do so regardless of the adequacy of the existing motor carrier service and the state of competition.

The Commission's conception of its authority for coordination appears to be more limited than is warranted by the policy of the Interstate Commerce Act and decision of this Court. United States v. Pennsylvania Railroad Company, 65 S. Ct. 471, 473.

Coordination between the Railroad and one or more independent carriers in the field required only the consent of the railroad in this particular case. Its stations and docks suitable for the applicant's use were equally suitable for the other motor carriers. The other motor carriers were willing to adjust their schedules to meet the needs of the railroad. They were certified common carriers with idle equip-

ment awaiting additional business; and were able and ready and anxious to acquire additional business and avoid further competition in that more-than-adequately-filled motor carrier field. Any claim of the railroad that the existing motor carriers were less desirable for the purpose of the railroad because they would be competing carriers, is a claim that could be made against all coordination between competing carriers. There is nothing in the record to indicate that the claim has significance beyond that of like claims which may be expected constantly to appear in involuntary coordination and which have been insufficient to prevent the operation of the policy of the Act and the exercise of the authority of the Commission. There could be little operation of law if the expected dissatisfactions incident to its application were to be considered sufficient reason to refuse to give it application.

This Court, in United States v. Pennsylvania Railroad Company, 65 S. Ct. 471, said:

> "There is no language in the present Act, which specifically commands that railroads must interchange their cars with connecting water lines. (Page 473). * * *
>
> "The 1940 Transportation Act is divided into three parts, the first relating to railroads, the second to motor vehicles, and the third to water carriers. * * *
>
> "The interrelationship of the three parts of the Act was made manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.' * * *
>
> "Congress further admonished that 'all of the provisions of this Act shall be administered and en-

forced with a view to carrying out the above declaration of policy.' * * *

"This policy cannot be carried out as to Seatrain's interstate carriage unless railroads interchange their cars with it. * * *

"The 'inherent advantages of the service' would be lost to the public without railroad car interchange. * * *

"If rail carriers are permitted to choose the particular boat lines with which they will establish through routes and joint rates, they will be able to dictate who shall operate upon the water and who shall not, for a boat which is accorded a monopoly of the through rail-and-water traffic will soon be able to drive its competitors out of business." (Page 474.)

In the present case the railroad seeks to interpose a new motor carrier, controlled by it, as a substitute for co-ordination with existing carriers. If it may do this, it and other railroads will be able to continue the practice which, as disclosed by the Commission cases cited in Appellants' briefs, is largely responsible for the new, extensive and growing competition of the railroad, through subsidiary motor carriers systems, in the motor carrier field. The ultimate consequence of this practice appears to be that contemplated in the paragraph last above quoted.

But assuming that there were no authority for coordination of rail and motor carrier service or facilities, such absence of power could, under the declared policy of the Act, be construed as an implied authority to rail carriers to obtain by engagement in the motor carrier field what the law under such assumption would prefer that they not have, even by regulated coordination.

The "integration" of all modes of carriage into a national

system of transportation does not imply single ownership or control of the system. "Coordination between carriers" does not imply consolidation or control of carriers and extension of control of one carrier over other carriers. Such merger and extension of control are contemplated only in the particular circumstances and under the conditions and standards provided for by the Act.

VI

THE RESTRICTIONS OF THE ORDER WERE NOT EFFECTIVE FOR THEIR STATED PURPOSE AND DO NOT SUSTAIN THE ORDER

The motor carrier service in the particular field and on the particular proposed routes was considered to be entirely adequate and the evidence showed it to be adequately if not too highly competitive.

The grounds upon which the Commission justified its order, as against such facts, were that the service of the applicant would be limited to handling of merchandise in substitution for train service; the "traffic in question" had been handled by the railroad; the service would be limited to auxiliary or supplemental service so as to insure that it would not be competitive with existing motor service (R. 11 and 12.)

The restrictions imposed on the applicant to serve the need of existing carriers for protection against additional competition, limited the applicant to the routes for which it applied and to the points it designated, which were stations on the railroad; and further so limited the applicant, that it could not transport from Grand Rapids entirely to Fort Wayne, or from Fort Wayne entirely to Grand Rapids; and could not render service not "auxiliary to or supplemental of" the rail service of the railroad.

There was no proof and no possibility of proof of what the "traffic in question" would be other than that the railroad expected to solicit actively and get what business it could for the carrier, and there was no limitation in the order to solicitation of freight from former shippers of the railroad or present shippers or to freight to be carried in part by rail. The applicant is authorized by the grant to carry any and all freight which the railroad can obtain by solicitation for carriage by rail and motor conjunctively and by motor alone, from any city and station point north of Fort Wayne to any other city or point north of Fort Wayne including the northernmost point of the routes or in excess of 500 miles in one general direction.

So far as it appears from any definition of dictionary or decision of the Commission, the terms auxiliary or supplemental are not limitations at all or at least not of any definable restrictive consequence.

In Southern Pacific Co., Control of Valley Motor Lines, Inc., MC-F-2073, 39 M. C. C. 441, where auxiliary and supplemental service was considered, the Commission said:

> "However, the meaning of the phrase 'Auxiliary and supplementary to train service,' as sometimes formerly used in acquisition cases has never been defined as to precisely what limitation of the operating authority was intended by those words. * * * Usually such evidence (evidence showing how such services could and would be used in various ways) has related to motor-carrier operations in combination and in coordination with the railroad's operations, resulting in expedited service, and savings for the railroad, but no condition has heretofore been imposed in acquisition cases limiting the transportation authorized solely to transportation in combination with the railroad or the railroad's freight or preventing the motor-carrier operations and service being made directly available

to the shipping public apart from and in addition to the railroad's service. The only definite restriction on the operating authority which was imposed in the Barker case and later cases has been designed to confine the motor-carrier operations acquired to the territory of the railroad through limiting the rights so as to authorize service only at stations on the railroad. Although, at times, a condition formerly was sometimes included in acquisition cases to the effect that the service to be rendered should be 'auxiliary and supplementary' to the railroad's service, there has been no indication in the reports that such condition was intended to prohibit rendition of all motor-carrier service directly for the shipping public under the operating rights in addition to, in substitution for, and in lieu of, the parent railroad's service, or to restrict the operation solely to one in combination with the railroad's operation; nor is it our understanding that it has been so construed by the carriers. In other words, evidence upon which affirmative action has often been based, and the finding made that the resulting service would be auxiliary and supplementary to that of the railroad, has been based upon motor-carrier operation in addition to, in substitution for, and in lieu of, the railroad's operation, as well as upon an operation in combination with the railroad."

If the railroad should fail to solicit any business for the applicant and the applicant solicited none, or if the independent carriers are successful in retaining all the shipper business they presently have and obtaining all that might be expected to accrue of new business, which is business the railroad disclosed its intention to solicit and which it, or so far as the order is concerned, the applicant may solicit, then the competition may not harm the existing carriers, but if the railroad can successfully solicit, as is its avowed intention, it is a potential competitor for carriage by motor car of all freight between, to and through all permissible points on the routes.

The potentiality of the grant for increase of competition in the motor carrier field is the test of the efficacy of the restrictions. As disclosed the restrictions have relatively little efficacy, since admittedly only two motor carriers cover all or nearly all the routes and the others, in the main are limited by their present grants along such routes as much as the applicant can be.

Recurring to definitions, "auxiliary" seems to mean supporting, cooperating, subsidiary and in a somewhat subordinate sense. "Supplemental" means serving to supply what is lacking; added to supply what is wanted. These definitions, from Webster's Dictionary, seem as broad and indefinite as the Commission has found the terms to be in the case last above quoted. The terms in fact are so broad as not to amount to limitations of grants at all but rather to amount to grants.

The limitations of the words are not substantial limitations on any competition by the applicant, which in the situation here can and very well may be, for all that appears in the record and from all that knowledge of normal acquisitive instinct may reveal, a definitely harmful and a possibly destructive competition for at least some of the present motor carriers.

There is more of significance in the failure of the Commission to impose a substantial limitation of motor carriage to freight of rail origin or termination, than there is of limitation in the socalled restrictions imposed.

VII

ACTUAL COMPETITIVE EFFECT OF PROPOSED OPERATION UPON EXISTING MOTOR CARRIERS WAS NOT CONSIDERED BY COMMISSION

The Commission found that "it did not appear that the restricted service would be directly competitive or unduly prejudicial to the operations of any other motor carrier." (R. 11.) True, there is an implication in the language employed that some measure of indirect competition with the operations of other motor carriers might prevail, a concession which the applicant itself, however, refused to make in its application, wherein it was stated in Exhibit C (b) that "applicant has no knowledge of any other motor carrier operating in the territory covered by this application, with whose operations the service herein proposed would be competitive." (R. 65.) If the finding of the Commission and the knowledge of the applicant are slightly contradictory, they are much less so than the following excerpts from the joint brief of appellants, The Willett Company of Indiana, Inc., and the Pennsylvania Railway Company:

On page 20 of the brief there appears this statement: "At the same time, in order to insure that the railroad will not use its or its subsidiary's motor vehicles to engage in competition with the general over-the-road service of existing independent motor carriers, the Commission has in such cases attached conditions designed to limit the proposed substituted service to service which will be auxiliary and supplemental to the railroad's service and to prevent the railroad or its motor carrier subsidiary from engaging in general over-the-road truck operations."

On page 21 opposite appears this statement: "This action by the Commission is clearly in accord with the applicable provisions of the Act and in furtherance of the Congressional policy declared therein. That policy contemplates, and the Commission's action in this case will promote, the development of an improved and better coordinated transportation system and will *encourage healthy competition.*

It may be noted too that the argument that existing motor carriers can not render the proposed service as well as the applicant, is apparently based on the theory that the existing motor carriers are competing carriers and hence not to be best depended upon by the railroad.

If the Commission means, by the use of the term "not directly competitive" that the applicant in rendering the service will only be the hand-maiden of the Pennsylvania Railroad, that as such hand-maiden it will refrain from soliciting business for itself, that it will file no tariffs, collect no freight charges from the shipper or receiver, maintain no terminals or agencies in its own name, then the letter, though not the essence, of its finding may be warranted by the evidence upon which it is based. It is stated also, as a factual basis for the finding that the "railroad has been and is transporting the traffic in question" and the conclusion is drawn that the proposed service is merely in substitution for the service now rendered by the railroad.

Is it not pertinent to observe that references to "business now carried" and "traffic now transported" are only relative so far as their application to present and future transportation is concerned? There is nothing more intangible than tomorrow's traffic whether by rail or highway, by water or air.

"Railroad's traffic" or "traffic of the railroad" and "railroad's freight" as employed in the proceedings before the Commission to import a kind of continuing proprietorship by the railroad over future shipper business, and also employed to indicate that the applicant carrying such supposed traffic would not be in competition with other carriers, have no existence in legal or factual sense. Any traffic which may be carried by one or two or more competing rail and motor carriers is the bag of none but game for each until bagged, and each day has its separate game and bag.

May it be expected that the Pennsylvania Railway will refrain from entering actively and aggressively into garnering for the applicant, all of the business which can be secured for carriage over the highway between the points on every route described in the application and that this powerful two-in-one combination will not become directly and aggressively competitive with the presently certificated motor carriers now rendering service to and from these competitive points?

It was said in Mannington v. Hocking Valley Ry. Co., 183 Fed. Rep. 133, 150, that 'competition as between railroads necessarily relates to transportation.'' The same rule applies, of course, to competition between carriers of any class. The fact that the business is secured by the Pennsylvania Railway and all financial transactions relative thereto as well as the details of billing and rate making are managed by the parent company are not the factors which determine the competitive relations between the railroad and its subsidiary on the one hand and the presently authorized motor carriers on the other hand. Transportation is the determining factor, and one or a dozen or a hundred trucks hauling general commodities

over the public highways under a Pennsylvania Railway bill of lading are engaged in exactly the same business as one or a dozen or one hundred of the trucks of the Norwalk Truck Line Company or of any other regularly authorized motor carrier operating over such public highways.

One cannot read the declaration of National Transportation Policy, and the other provisions of the Motor Carrier Act without reaching the conclusion that in the enactment of the Statute, including its amendments, Congress did not have in mind the creation of a well regulated system of highway transportation which, after much development, would by and with the approval of the administrative authority delegated to supervise its operation be subjected to the threat of extinction by a process of progressive infiltration of a highway transportation system owned and operated by the railroads.

It should be obvious to the most casual observer that if the steady progress of grants of this character continue the time is not far distant when practically every rail line in the country will have its "supplementary and auxiliary" motor truck systems, owned and operated by itself. What such a situation will mean to the regular motor carrier industry is graphically illustrated by reference to Exhibit 2 (R. 424), filed by the applicant in the hearing before the joint board. This exhibit, while intended primarily to designate the routes proposed to be utilized by applicant, shows the network of rail lines which serve the general territory included within the limits of lower Michigan, northern Ohio, northern and central Indiana, and the eastern portion of Illinois, including the city of Chicago.

In discussing the so-called safeguards, which the Commission has attempted to incorporate in its order to prevent "expansion into or encroachment upon service of

other motor carriers, Counsel for the Commission at p. 25 of Appellant Commission's brief comments as follows:

> "But running throughout all of these cases is shown the consistent policy on the Commission's part to foster and encourage this improved form of service but at the same time to set safeguards against an expansion to a point where it might compete destructively with the highway service of the independent motor carriers. A *cursory* examination of the reported cases exhibits this policy."

In using the term "cursory" counsel has perhaps unintentionally but nevertheless correctly, described the type of examination which would warrant a conclusion that the safeguards referred to will accomplish the purpose which counsel assumes their mission to be. "Cursory" is defined by Webster as "hasty", "slight", "superficial", "careless." A deeper, more searching analysis of the matter will disclose the fallacy of such a conclusion.

The grant of the certificate permits the applicant to engage in unrestricted common carriage, for the public, of general merchandise to, from and between the fifty or more permissive cities and towns on the specified routes. It is the potentiality of the grant, not the declared, or supposed intention of the railroad, that determines the cognizable competitive status. An actual or supposed intention not to solicit business, which would include inferentially an intention not to permit the rail carrier to solicit independent business for the applicant, a suggested intention that no shipments would be accepted by the applicant if in a quantity equal to a carload lot, or that the applicant would not solicit or procure someone to solicit business for it outside the intimated field, are all mere intentions in futuro, and within the volition of the railroad and the applicant. And such volition is legally commensurate with the broad-

est possible grant, unless the grant is specifically restricted. Intentions of such character do not and cannot be treated as restrictions or as factual or legal bases for the determination of any essential fact to support the grant of the certificate.

VIII

THE RECOGNITION OF A NEW MODE OF MOTOR CARRIAGE AND A NON-STATUTORY STANDARD IS NOT WITHIN THE AUTHORITY OF THE COMMISSION

Some railroads prior to the Act of 1940 utilized motor transportation for terminal purposes and short hauls of 15 or 20 miles to points otherwise without service and perhaps to some other points with other service.

Nothing can be deduced from such use or the fact that the Act did not specifically authorize or specifically, in terms, take note of the short service. As to terminal use there was no question. If the short service was in violation of the Act the continuance of the violation created no precedent. If Congress intended to disregard it, it can not be conceived to have significance worthy of attention within the broad purpose and policy of the act.

However, this is not a case of terminal service, or of short service. It is a case in which the carriage contemplated is extensive in mileage and in quantity. More than that it is a case reflecting the potentialities of encroachment by rail carriers, by 500 mile installments, on the motor carrier field. Willett company to service 25 routes; which if as long as those here involved, would cover 1,750 miles. The Commission found that this grant would round out the applicant's service of Pennsylvania rail stations within the western region. (R. 7.) It is known from the Commission decisions that the Willett system is not the

only motor carrier system serving the Pennsylvania in like auxiliary and supplemental manner.

Such expansion needs no new definitions to justify it if the statutes warrant it, and a designation of the service as "new type" will not justify recognition of it without statutory warrant.

It is obvious that there is no new mode of carriage involved. Long before the Act motor carriers served rail carriers, and carriage begun by truck terminated by rail, and freight originating by rail terminated by truck. The only thing new in the joint carriage or use of two carriers to transport freight, is the relation of the railroad companies in acquiring the motor carriage end of the business. The name in which freight is carried does not affect the nature of the carriage. Ownership of rail and motor carrier by one or more than one does not alter the two modes or destroy their separate identity. Rail carriage is rail carriage while on rails, motor carriage is motor carriage while on trucks. A passenger traveling by bus half way to San Francisco by bus and half by rail is not a new and novel individual, he is just a passenger who when in a bus is a bus passenger and when on a train is a train passenger, and this would be true if it owned both the bus and train, or if another did.

The argument of the Commission brief that the mode is new and different and subject to a different standard or criteria and that it antedated the present Act and must have been tacitly approved by Congress, is not more persuasive than the claim that water carriage is not water carriage if it is to be transferred to rail ultimately or comes from rail and it is not even motor carriage if the hand of the rail owner touches it but is something new, though it may begin, continue and end on truck.

The question is not whether the carriage is of a new type. The question is, whether there is anything in rail ownership or control of motor carrier service used conjunctively in part with rail service which would justify the grant of a certificate to a rail carrier nominee when there is adequate, willing and able motor carriage service in the field available to the public and the rail carrier? Another basic question is also involved, in principle; viz.: is there anything in the nature of the service or in the nature of the Act which would justify duplication of facilities and equipment and double consumption of oil, gasoline, rubber and steel, when a subsidiary of a railroad is applicant but which would not justify a grant to a new independent carrier for the purpose?

If these discriminations are to be applied, there should be warrant for it in the Act. The Commission has not that power of legislation required to fix new standards. Nothing in the policy of the Act, the broad purpose of it or the closest definitions of it, suggests that certificates of public convenience and necessity are to be granted under certain standards of requirements when an independent applicant appears and by another standard when other applicants appear.

The order is conscious of this discrimination and reflects it. It can not be said from an examination of the evidence or the findings that the elements which constitute public convenience and necessity appear in the record or have been applied in the Commission's rationalization.

To sustain the order, the evidence and the findings should show the basis of this grant to be within the intendment of the statute. This is not accomplished by strain to find something new and different, that will justify an unorthodox application of the statutory standard or the adoption

of a new and unauthorized standard. It is not accomplished by a finding, wholly without evidence that existing certified carriers, equipped and willing and able to render the proposed kind of service (which some of them are now rendering) can not render as well as public convenience and necessity require or as well as the applicant.

IX

CONCLUSIONS

The decree of the District Court is well sustained by the record and should be affirmed.

Respectfully submitted,

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APPENDIX

Pertinent Findings of the District Court and Conclusions of Law

The plaintiffs in this suit are motor carriers who are competitors of the above-named applicant with respect to the operations authorized by the proposed certificate and associations of motor carriers.

At the hearing plaintiff introduced in evidence a certified copy of the record before the Interstate Commerce Commission. This was all the evidence in the case.

The operations proposed are motor carrier operations which would be competitive with existing motor carrier service. The railroad, however, refused to make use of any of the existing lines. The applicant's proof concerned an alleged improvement in railroad service. No proof was made or offered by the applicant or presented in evidence that present highway common motor carrier transportation service by duly certificated carriers operating in interstate or foreign commerce and serving the points proposed to be served by the applicant was or would be inadequate to serve the public need therefor. Proof was presented before the Commission by the plaintiff and other protestants concerning the adequacy of existing common motor carrier service. There was no substantial evidence to prove public convenience and necessity.

Conclusions of Law

Upon the above and foregoing Special Findings of Fact, the Court now states its Conclusions of Law, as follows, to-wit:

I

The Court has jurisdiction of the subject matter and of the parties in this cause of action.

II

The applicant did not meet the statutory requirements and the Interstate Commerce Commission failed to exact from applicant, as a railroad subsidiary, the requisite proof to establish public convenience and necessity.

III

There was no substantial evidence to support the order of the Interstate Commerce Commission that public convenience and necessity requires the issuance to applicant of a certificate of public convenience and necessity authorizing operations by motor vehicle as a common carrier of property over the routes involved, and the order is, therefore, illegal and void and should be permanently enjoined.

R. pp. 44, 45, 46.

EXCERPTS FROM ACT

Sec. 203 (a) (14) as amended, Transportation Act of 1940.

"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore bee subject to Part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to Part I."

Sec. 203 (a) (14) Motor Carrier Act 1935.

"The term 'common carrier by motor vehicle' means any person who or which undertake, whether directly

or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operation of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of Part I."

Section 217 (a), Part II of the Interstate Commerce Act.

"Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water when a through route and joint rate shall have been established."

Section 219 of Part II of the Interstate Commerce Act as amended by Public Law 558, 77th Congress, Sec. 3, approved May 16, 1942, and by Public Law 703, 77th Congress, 2nd Session, approved August 7, 1942.

"The provisions of section 20 (11) and (12) of Part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable."

Section 20 (11) of Part I of the Act referred to in Section 219 of Part II, supra.

"That any common carrier, railroad or transportation company subject to the provisions of this part re-

ceiving property for transportation from a point in one State or Territory or the Distfict of Columbia to a point in another State, Territory or District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading. * * * And provided further, That for the purposes of this paragraph and of paragraph (12) the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination, and not a carrier performing merely a switching service at the point of destination: And provided further, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this part provided."

Transportation Act of 1940 (54 Stat. 899): (All emphasis supplied.)

POLICY.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or *unfair* or destructive competition practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equi-

table working conditions; *all to the end* of developing, *coordinating*, and *preserving* a *national transportation system by water, highway, and rail*, as well as other means, *adequate* to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carry out the above declaration of policy.

CONSOLIDATION—CONTROL

"SEC. 5. (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or * * *

"(b) *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the *public interest* and will enable such carrier to use service by motor vehicle to public advantage in its operations and *will not unduly* restrain competition.

CERTIFICATE—PUBLIC CONVENIENCE AND NECESSITY

"SEC. 206 (a) Part II. Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *.

"SEC. 207 (a). Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or *future public convenience and necessity;* otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."